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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

J.B. CRUZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Judge

No. 16-1-03678-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant receive a public trial when the parties met in chambers to discuss three different technical or ministerial matters which were later put on the record? (Appellant's Assignments of Error No. 1 and 2)
2. When viewed in the light most favorable to the State, was sufficient evidence presented that the defendant partially or completely obstructed the victim's ability to breathe? (Appellant's Assignment of Error No. 3)

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 15, 2016, J.B. Cruz, hereinafter "defendant" was charged with assault in the second degree, interfering with the reporting of domestic violence, and unlawful imprisonment. CP 3-4. All charges were also alleged to be domestic violence offenses. *Id.* On March 21, 2017 both parties appeared for trial. 2RP 88.

During jury selection, the trial court indicated that each party would exercise its peremptory challenges in open court by passing the

sheet back and forth. 2RP 92-93. During the trial, the court made a record about three “sidebars”¹ that had occurred in chambers. The first occurred on March 21, 2017, the same day as voir dire. The court stated:

The other thing, I want to make a record of the sidebars that we had at the end of the questioning by the attorneys. I had counsel come back into my chambers briefly to discuss a couple of different things. The first one was, I had indicated Juror No. 4 had represented or acknowledged in the questioning that she knew Detective Moss, and there hadn't been any follow-up questioning about that. I asked if you wanted the Court to inquire in regards to that. The defense indicated that was not necessary, that it was a strategic decision on your part not to inquire any further about that. I didn't take any action.

The second subject that we talked about were three of the jurors that had indicated a hardship that might fall within the time period of this trial. Juror No. 8 had the orthodontist appointment on Monday the 27th in the morning to get her braces off. All counsel agreed that juror should be excused, given the magnitude of that event and the fact that we may very well be in trial or the jury deliberating on Monday morning.

Juror No. 20 had the CT scan for his wife on Tuesday the 28th in the morning. All parties agreed to excuse that juror as well on the off chance we might get to either continuing the trial or deliberations on that day as well, given the circumstances of him being transportation for his wife.

Juror No. 17, who had the standing appointment at the VA, 3:00 on Tuesday, which is today, the parties agreed he could be excused. When I asked him about the appointment, he indicated he had cancelled it and, in fact, has been seated on the jury.

¹ While the trial court here calls these conferences “sidebars,” it is clear from the record that they actually occurred in chambers and not in the courtroom itself. For purposes of this response the State will refer to these meetings as “conferences.”

That was the first sidebar that we had.

2RP 168-169.

Defense counsel agreed with the court's description of what occurred. *Id.* The court then made a record regarding the second time the parties went into chambers:

The second time we went back is when the parties had exercised your peremptory challenges. I had filled out the chart indicating the 14 jurors I felt had been selected. I wanted to make sure that both counsel had the same numbers and the same order and, in fact, both of you did. We came back out and I seated the jury at that time. Those are the two occasions we stepped into chambers. As I indicated earlier, it is not my preference to do that any further.

2RP 169-170.

Again, defense counsel agreed with the trial court's recitation of what had occurred. 2RP 170. The defendant was convicted of assault in the second degree and unlawful imprisonment. CP 44-49. The defendant was sentenced to a standard range sentence of one year and one day. CP 67. The defendant filed a timely notice of appeal. CP 84.

2. FACTS

Desiree Frieg lived in Pierce County for approximately two and a half years with a roommate and her daughter. 2RP 154, 158. The defendant was Frieg's boyfriend for two years, having met him in January of 2015. 2RP 154-155. At the time they started dating, Frieg's daughter

was three months old. 2RP 155. Her daughter shared a room with Frieg and would sleep in her own bed next to Frieg's. 2RP 159. Frieg would see the defendant daily or at least every other day and she was in love with him. 2RP 155. During their relationship the defendant would stay with Frieg almost every night and would keep his clothing at her residence. 2RP 157.

On September 7, 2016, the defendant was at Frieg's residence and they had dinner together. 2RP 158-159. Frieg put on a movie in her bedroom lay down next to the defendant on the bed. 2RP 159. Frieg sent a text message to her child's father regarding a doctor's appointment for the child. *Id.* The defendant asked Frieg when she was going to tell him that she was texting the child's father. 2RP 160. The defendant became angry, and Frieg told him it was none of his business. *Id.* At her response, the defendant began "lashing out." *Id.* The defendant became angrier than Frieg had ever seen him. 2RP 161.

The defendant put Frieg into a choke hold. 2RP 162. During this choke hold the defendant's arm was around Frieg's throat and she felt like she could not breathe. *Id.* The defendant's hold got tighter on her throat and Frieg thought was going to pass out. 2RP 163-164. His arm was around Frieg's throat for a few minutes. *Id.* The defendant restricted her

breathing “a little bit.” 3RP 239. He had his hand on her throat four or five times. 2RP 166.

During this incident Frieg’s daughter was present in the room and started crying. 2RP 163. Frieg started slapping the defendant and pushed him away. 2RP 165. The defendant shoved her against the wall multiple times. *Id.* After attempting to leave for 15-20 minutes, Frieg was able to leave the bedroom. 3RP 180. The defendant told Frieg he was going to get the “Plan B” contraceptive pill. *Id.* The defendant returned with the pill. 3RP 182. Frieg was scared and did not want the situation to escalate, so she went to the fire department across the street. 3RP 183-184.

Pierce County Sheriff’s Deputy McEathron and Smith responded to make contact with Frieg. 3RP 242-244. Deputy McEathron took photos of the marks on Frieg’s neck. 3RP 196, 249. Deputy McEathron observed redness to Frieg’s neck and swelling on her face and wrist. 3RP 249, 256. Detective Moss observed very faint red marks on Frieg’s neck as well as a red mark on her wrist and bruising on her arm. 4RP 307. Frieg went to urgent care for treatment. 3RP 199.

C. ARGUMENT.

1. ALL DISCUSSIONS THAT OCCURRED IN CHAMBERS WERE REGARDING TECHNICAL OR MINISTERIAL MATTERS FOR WHICH THE DEFENDANT'S PUBLIC TRIAL RIGHTS ARE NOT IMPLICATED AND A TRIAL RECORD WAS MADE ABOUT WHAT HAD OCCURRED.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury."

The state constitution also provides that "[j]ustice in all cases shall be administered openly." Wash. Const. article I, section 10. This provision grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at

all trial stages.” *Lormor*, 172 Wn.2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). However, “case law does not hold that a defendant’s public trial right applies to every component of the broad ‘jury selection’ process,” but “only to a specific component of jury selection – i.e., the ‘voir dire’ of prospective jurors who form the venire.” *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013); *See also State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1213, fn 5 (2013).

The right to a public trial is violated when: (1) the public is fully excluded from proceedings within a courtroom, *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); (2) the entire voir dire is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); (3) and is implicated when individual jurors are privately questioned in chambers, *see State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and *State v. Strobe*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors). In contrast, conducting individual voir dire in an

open courtroom without the rest of the venire present does not constitute a closure. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008).

“The right to a public trial, however, is not absolute, and a trial court may close the courtroom under certain circumstances.” *Wilson*, 174 Wn. App. at 334. “To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the *Bone-Club* factors and make specific findings on the record to justify the closure.” *Id.* at 334-35.

The *Bone-Club* factors are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Wilson, 174 Wn. App. 328, 335, fn 5, 298 P.3d 148 (2013)

(quoting *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325

(1995) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*,

121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

“Failure to conduct a *Bone-Club* analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial.” *Wilson*, 174 Wn. App. at 335.

However, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *Sublett*, 176 Wn.2d at 71. Rather, as this Court has noted, the Supreme Court’s decisions in *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012),

appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a *Bone-Club* analysis before the trial court may “close” the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy *Sublett*’s “experience and logic” test?

The *Sublett* “experience and logic” test, first formulated by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), proceeds as follows:

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” If the answer to both is yes, the public trial right attaches and the

Waller or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73.

Applying that test, the *Sublett* Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.* at 74-77. “None of the values served by the public trial right is violated under the facts of this case... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record.” *Id.* at 77.

The defendant has the burden to satisfy the "experience and logic" test. See *In re Personal Restraint of Yates*, 177 Wn.2d 1, 29, 296 P. 3d 872 (2013); *State v. Love*, 176 Wn. App. 911, 919, 309 P.3d 1209, 1214 (2013).

“Whether a defendant’s constitutional right to a public trial has been violated is a question of law, which [appellate courts] review de novo on direct appeal.” *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013); *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court’s ruling, not by the ruling’s actual effect. *In re PRP of Orange*,

152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

Division Three of this Court has considered and rejected the same argument made by the defendant here. In *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). The Court there applied the "experience and logic" test of *Sublett* and held "that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have been error to consider the peremptory challenge in that manner if the court had done so." *Love*, 176 Wn.2d at 917-918. In *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), the Washington Supreme Court agreed that sidebar conferences do not implicate a public trial right. The court held, "Nothing is added to the functioning of the trial by insisting that the defendant or public be present during a sidebar or in-chambers conferences." *Id.* at 519.

With respect to the experience prong of the *Sublett* test, the Court found no authority to require challenges for cause to be conducted in public. Indeed, it found that "there is no evidence suggesting that historical practices required these challenges to be made in public." *Love*, 176 Wn.2d at 917. Hence, the Court concluded that "[o]ur experience does not require the exercise of these challenges," whether for cause or peremptory, "be conducted in public." *Id.* at 919.

With respect to the logic prong, the Court found that the purposes of the public trial right

[s]imply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide.

Love, 176 Wn. App. 911 at 919.

Thus, as the Court in *Love* concluded, “[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public.” *Id.* Therefore, “the experience and logic test confirms that the trial court did not erroneously close the courtroom by hearing the defendant’s for cause challenges at sidebar.” *Id.*

The defendant relies on *State v. Whitlock*, 188 Wn.2d 511, 396 P.3d 310 (2017). *Whitlock*, however, is distinguishable from the present case. In *Whitlock*, the parties and the trial court had an in chambers meeting regarding the State’s objection to the defense’s line of cross examination of a witness. *Id.* at 517. The State argued that the questioning was both an attempt to intimidate the witness into revealing that she was a police informant and it was irrelevant. *Id.* The court agreement with the State. *Id.* After the recess, a record was made as to what had occurred in chambers. *Id.* The Washington Supreme Court held that the actions of the court constituted a courtroom closure and was not

purely technical or legalistic in nature. *Id.* at 523. In that case, the court heard legal argument and made a ruling. By contrast, nothing of substance was discussed in any of the three areas discussed in this case. Here the court took no action regarding a juror who may have known a State's witness, confirmed the agreed hardship excusals and confirmed the peremptory challenges that were exercised in open court. Unlike what occurred in *Whitlock*, nothing of substance on any factual matters were discussed in chambers.

In the present case, the defendant argues that two in-chambers discussions that occurred constituted courtroom closures. Opening Brief of Appellant, p. 5-6. During the first of these meetings, two subjects were discussed—whether either party wanted the court to make additional inquiries of a juror who knew Detective Moss, a witness in the case, and agreed excusals of jurors for hardship. The second discussion was a meeting to confirm the peremptory challenges that had been exercised in open court. As argued below, the record establishes that neither discussion constituted a closure.

- a. The trial court's inquiry as to whether counsel wanted follow up questioning of a juror who stated she knew a State's witness did not violate the defendant's right to a public trial when no argument was heard and the court did not take any action.

The right to a public trial applies to all judicial proceedings, specifically including jury selection, but it is not absolute. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). The resolution of technical legal issues does not impair public oversight or deny the public the ability to weigh a defendant's guilt or innocence. *State v. Smith*, 181 Wn.2d 508, 516-518, 334 P.3d 1049 (2014).

In this case, the court inquired, in chambers, if the parties wanted follow up questioning of a juror who stated that she knew Detective Moss, a witness in the case. 2RP 168-170. No additional questioning was requested by either party and no additional questions were discussed. No action was taken by the trial court. This matter was merely a technical question which resulted in no further inquiry. Therefore, the defendant is not entitled to relief on this claim.

- b. The defendant's right to a public trial was not violated when the parties reviewed the agreed excusals for hardship in chambers.

"The public trial right is not implicated by the preliminary excusals for statutory reasons (including hardship) based on juror questionnaires." *State v. Russell*, 183 Wn.2d 720, 730, 357 P.3d 38 (2015). In *Russell*, the

Washington Supreme Court held that “work sessions” to review juror questionnaires for hardship did not violate the defendant’s public trial right. *Id.* at 733. The trial court held the work sessions and then later announced the decisions about which jurors were going to be excused for hardships in open court. *Id.* at 724. The Supreme Court affirmed, holding:

The public trial right is not implicated by preliminary excusals for statutory reasons (including hardship) based on juror questionnaires. *See Slett*, 181 Wash.2d at 605–06, 334 P.3d 1088 (González, J., lead opinion), 614, 334 P.3d 1088 (Stephens, J., dissenting). Determining whether a juror is able to serve at a particular time or for a particular duration (as in hardship and administrative excusals) is qualitatively different from challenging a juror's ability to serve as a neutral factfinder in a particular case (as in peremptory and for-cause challenges). *See In re Pers. Restraint of Coggin*, 182 Wash.2d 115, 117, 340 P.3d 810 (2014) (C. Johnson, J., lead opinion); *In re Pers. Restraint of Speight*, 182 Wash.2d 103, 105, 340 P.3d 207 (2014) (C. Johnson, J., lead opinion); *cf. State v. Irby*, 170 Wash.2d 874, 882, 246 P.3d 796 (2011) (drawing the distinction in the context of the defendant's right to be present). In addition to our own case law, this distinction is supported by the statutes and rules regarding juror selection proceedings. See GR 28(a) (setting forth “procedures for postponing and excusing jury service under RCW 2.36.100 and 2.36.110 and for disqualifying potential jurors under RCW 2.36.070”), (b)(3) (explicitly distinguishing between excusal for statutory reasons and “peremptory challenges or challenges for cause that fall outside the scope of this rule”); CrR 6.4 (governing voir dire, challenges for cause, and peremptory challenges).

Id.

This case is analogous to *Russell*. The hardships were agreed to by both parties and a record of the reason for each hardship excusal was put on the record. 2RP 168-169. Like *Russell*, no jurors were questioned during this discussion with the attorneys. As the court stated, the public trial right is not implicated by hardship recusals, which is also what occurred in this case.

- c. The defendant's right to a public trial was not violated when the parties went into chambers to confirm the trial court's accounting of the peremptory challenges that were exercised in open court.

The defendant asserts that the exercise of peremptory challenges was done in chambers, but such assertion is factually inaccurate. Brief of Appellant, page 11. The trial court specifically stated that the peremptory challenges were going to be done in open court, and there is nothing in the record to suggest that it did not occur as the court ordered. 2RP 92. The trial court stated:

Peremptory challenges will be done on paper here in open court. The jurors will be remaining on the benches where they will be. We have an observer. He is certainly welcome to be here. It is an open court. . . . Once you have exercised the peremptory challenges, you'll hand the paper to me. I'll make notes on the chart that I have, as far as who I think you have selected, then I will ask counsel to step into chambers for a quick sidebar, just so I go over the 14 jurors that I think we have seated on the panel and make sure we are all on the same page in case there are any issues that come up. I would rather clear them up back there than to seat somebody that is a surprise to either side.

That's the only time we do a sidebar. I don't typically do sidebars during trial.

2RP 92-93.

After the peremptory challenges had been exercised by the passing of the challenge sheet between the parties in open court, the court held an in-chambers discussion merely to verify the selections. According to the trial court, all parties were in agreement with the peremptory challenges. 2RP 168-70. What occurred in this case is akin to the "work sessions" that were utilized in *State v. Russell, supra*. As in *Russell*, the court here announced beforehand the procedure that was going to be used and after the work session, he made a record in open court about what was discussed. In this case, what was discussed appeared to be nothing more than a conformation from the parties that the court's accounting of the peremptory challenges was accurate. Such conference does not offend the defendant's public trial rights.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THE DEFENDANT COMMITTED ASSAULT IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. *See Camarillo, supra*. The

differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

Id. (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant alleges that there was insufficient evidence presented that the defendant actually strangled or attempted to strangle Frieg. Brief of Appellant, page 13. In order to find defendant guilty of assault in the second degree the jury had to find that: 1) on or about September 7, 2016, the defendant intentionally assaulted Frieg by strangulation; 2) that the act occurred in Washington². CP 20-43 (Instruction No. 7); *see also* RCW 9A.36.021(1)(g).

The jury was also instructed as to the meaning of strangulation:

“Strangulation” means to compress a person’s neck, thereby obstructing the person’s blood flow or ability to

² The defendant does not allege in his opening brief that there was insufficient evidence to support the element that the act occurred in the State of Washington. There was, however, testimony presented to support this element. 2RP 158.

breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

CP 20-43 (Instruction No 10).

The sufficiency of strangulation evidence was specifically addressed in *State v. Rodriguez*, 187 Wn. App. 922, 352 P.3d 200 (2015). In *Rodriguez*, the defendant went to trial on assault in the second degree. *Id.* at 925. Testimony was presented that the defendant grabbed the victim by the throat and squeezed. *Id.* at 926. When asked if she could breathe, the victim stated "No, not really; with the grace of God." *Id.* at 926-927. The defendant choked the victim for a second time, causing her to have difficulty breathing. *Id.* The victim had darkness and swelling on her neck. *Id.* at 928. The court held that sufficient evidence was presented to establish strangulation. *Id.* at 935. The court stated that the word "obstruct" as used in the definition of strangulation does not mean to "completely obstruct" but rather it means "to hinder or block to *some* degree." *Id.* at 935 (emphasis added). In other words, "obstruct" means to both partially obstruct and to completely obstruct a person's ability to breathe. *Id.* at 934.

The evidence in this case shows that, when taken in the light most favorable to the State, sufficient evidence was presented to establish that strangulation occurred. Frieg testified that the defendant restricted her

breathing “a little bit,” which is direct evidence of at least a partial obstruction, if not a complete obstruction. 3RP 239. She stated that she thought she was going to pass out when the defendant had his hand around her throat and she felt like she could not breathe. 2RP 162-164. Frieg’s testimony, when taken in the light most favorable to the State, supports that the defendant partially or fully obstructed Frieg’s ability to breathe. Moreover, similar to the facts of *Rodriquez*, Frieg also had visible injuries to her neck which corroborate Frieg’s testimony. 3RP 249, 256; 4RP 307. Based on the testimony presented, sufficient evidence was presented and this court should affirm the jury’s verdict.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant’s convictions below.

DATED: March 12, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Michelle Hyer
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.13.12 E. Thewert
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 13, 2018 - 12:08 PM

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